

73834-8

73834-8  
ORIGINAL

No. 73834-8-I

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**COURT OF APPEALS  
DIVISION I**

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4518 S. 256<sup>th</sup>, LLC, a Nevada Limited Liability Company,

Appellant,

v.

KAREN L. GIBBON, P.S., Trustee; RECONTRUST, N.A., Trustee,  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS")  
acting as nominee for COUNTRYWIDE HOME LOANS, INC., Beneficiary;  
THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, as  
Trustee for the certificate holders of the CWABS, Inc., Asset-Backed  
Certificates, Series 2006-7,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

The Appellant's appeal is not barred by waiver, since the failure to enjoin the foreclosure sale is not dispositive. Pursuant to recent controlling case law from the Washington Supreme Court, post-foreclosure claims pursuant to the Deed of Trust Act are available regardless of whether the party successfully enjoined the sale. Furthermore, the Respondent's waiver argument is unpersuasive since the Appellant is not seeking to unwind the sale but, instead, seeks declaratory relief that would allow pursuit of resulting damages.

## II. ARGUMENT

### A. The Respondents' Waiver Argument is unpersuasive.

The Respondents' argument concerning waiver is inapplicable and unpersuasive. Waiver would apply, if at all, under circumstances where the Appellant sought to unwind the foreclosure sale. *See Respondent's Brief, page 10*. In the instant matter, the Appellant seeks declaratory relief from the trial court that the statute of limitations has run on the Respondents' claims with regard to the deed of trust that encumbered the property. *See CP 230-8*.

The Respondent erroneously argue that the "Appellant's only claim on appeal is that the trial court erred by failing to quiet title to the Property."

*See Respondents' Brief, page 11.* In fact, the Appellant's claim on appeal is that the Respondents' claims pursuant to the Deed of Trust and promissory note in question had been accelerated and the six-year statute of limitations on said claims had expired. *See Appellant's Brief, page 2.* The Respondents misunderstand the claim on appeal: the Appellant alleges that the Respondents' foreclosure on the property was wrongful because the applicable statute of limitations had expired; not that the trial court erred by failing to quiet title to the property. As such, there is no waiver pertaining to the fact that the Appellant "[failed] to restrain the trustee's sale" as alleged by the Respondents.

**B. Appellant's Appeal is not Moot as alleged by the Respondents.**

The Respondents allege that this appeal is moot because the real property in question has been sold; however, the Respondents concede that a case is only moot if a court can no longer provide effective relief. In the instant case, the court may provide effective relief to the Appellant, upon a successful appeal, by providing declaratory relief that the statute of limitations had run and the Respondents' claims under the Deed of Trust and promissory note had expired. As such, the foreclosure sale of the property was wrongful and the Appellant is entitled to relief from that wrongful sale, including without limitation monetary damages.

The Appellant's Complaint seeks declaratory relief that the Respondents' claims under the Deed of Trust and promissory note were barred by the statute of limitations, which would thereby make the Respondents' foreclosure upon those instruments wrongful. As such, the Appellant would be entitled to relief pursuant to the wrongful foreclosure and all damages flowing therefrom.

In Frias v. Asset Foreclosure Services, Inc., et al, 181 Wn.2d 412, 334 P.3d 529 (2014), the Washington Supreme Court held that, for a party to have a claim for monetary damages under the Deed of Trust Act, there must be a completed foreclosure sale. See Frias v. Asset Foreclosure Services, Inc., et al, 181 Wn.2d 412, 539, 334 P.3d 529 (2014). This decision effectively overruled the Court of Appeals, Division I decision in Walker v. Quality Loan Serv. Corp., 176 Wn.App. 294, 308 P.3d 716 (2013) which held that Washington law recognizes a cause of action for monetary damages under the Deed of Trust Act even if no foreclosure sale has been completed. Accordingly, there can be no claim for monetary damages until there is a completed foreclosure sale.

As such, prior to the completed foreclosure sale, the Appellant's claim for declaratory relief and the monetary damages flowing therefrom would be subject to the argument by the Respondents that pursuant to Frias, there was no viable claim. Furthermore, the Respondents would argue that

until there was a foreclosure sale pursuant to the Deed of Trust Act, any claim for wrongful foreclosure had not ripened and/or could not attach. This places the Appellant (and any borrower or grantor under the Deed of Trust Act) in an untenable situation where prior to the foreclosure sale, the claim is unripe because there has been no foreclosure sale and after the foreclosure sale, the claim is moot because no relief can be granted.

Pursuant to RCW 61.24.127(1), failure to enjoin a foreclosure sale may not be deemed a waiver of a claim for damages resulting from wrongful foreclosure:

The failure of the borrower or grantor<sup>1</sup> to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting: . . . (c) Failure of the trustee to materially comply with the provisions of this chapter.

RCW 61.24.127(1)(2015). See also *Frias*, 181 Wn.2d 412, 423, 334 P.3d 529 (2014).

The *Frias* Court noted that this provision explicitly recognizes a cause of action for damages premised on a trustee's material DTA violation which the *Frias* Court then determined was only available upon completion of the foreclosure sale. Therefore, pursuant to *Frias*, the Appellant would not be entitled to damages pursuant to its declaratory relief claim until after

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<sup>1</sup> "Grantor" is defined as "a person, or **its successors**, who executes a deed of trust to encumber the person's interest in property as security for the performance of all or part of the borrower's obligations." See RCW 61.24.005(7) (2016) (emphasis added).

a completed foreclosure sale. Accordingly, the Appellant's claim is neither waived nor moot.

**C. Respondents misstate the cited authority.**

Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank, 80 Wn.App. 655, 910 P.2d 1308 (1996) supports the presumption that acceleration must have occurred at the point of the 11-day period prior to the foreclosure sale. In fact, the court recognized that an acceleration had to have, and did in fact, occur: “[t]he Bank’s acceleration of the loan and including of default interest were permissible under RCW 61.24.090.” See Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank, 80 Wn.App. 655, 670, 910 P.2d 1308 (1996).

The Respondent cites to Wedderien v. Collins, 937 A.2d 140, 2007 WL 3262148 (Del., Nov. 6, 2007), an unpublished Delaware decision that has no application to the Washington statutory scheme pertaining to nonjudicial foreclosures. Wedderien is irrelevant to the issues at hand since there is no dispute that a notice of acceleration is, per se, an acceleration. However, a notice of acceleration is not the only method by which acceleration may be made in a clear and unequivocal manner.

Heist v. Dunlap & Co., 193 Ga. 462, 18 S.E.2d 837 (1942) is another example of where acceleration may occur by a manner other than through a formal “notice of acceleration” letter (i.e., through advertisement). See Heist v. Dunlap & Co., 193 Ga. 462, 466, 18 S.E.2d 837 (1942). In fact,



the court found that a notice of intent to accelerate was not a precondition to accelerating the debt – a holding which supports the finding that a formal “notice to accelerate” is not required to initiate acceleration.

**D. Respondents’ argument concerning the tolling period is unsupported and leads to absurd results whereby the statute of limitation never expires and can be extended indefinitely by being “re-started”.**

The Respondents’ analysis with regard to the statute of limitations and *Bingham v. Lechner*, 111 Wn.App. 118, 45 P.3d 562 (2002) is inaccurate and results in lack of clarity with regard to the purpose of the statute of limitations. Respondents argue that the six-year statute of limitations was tolled until March 13, 2009 (120 days after the scheduled foreclosure sale) at which time it began to run. The first issue for the Respondents is that there is no evidence that the prior Trustee continued the November 14, 2008 sale so as to extend the tolling beyond the sale date.

In *Bingham*, there was an issue as to whether the sale had been properly continued. Without having to decide that issue, the Court was still able to find that the statute of limitations had run by the time of the second foreclosure regardless of a continuance or not. That said, a fair reading of the *Bingham* holding cannot stand for the proposition tolling continues for 120 days when the sale has not been properly continued.

In fact, the statute of limitations remains a six-year period of time from the date of acceleration which was the Notice of Trustee's Sale recorded on August 15, 2008. In *Bingham*, the Court held:

In sum, the trial court's reading of RCW 61.24.040(6) was correct. Demopolis's filing of foreclosure proceedings in July 1993 tolled the statute of limitations. Pursuant to RCW 61.24.040(6), he was entitled to continue the sale, originally scheduled for December 17, 1993, for 120 days. **His failure to do that restarted the statute of limitations either on December 18, 1993, the date scheduled for the foreclosure or 120 thereafter, which was April 17, 1994. Demopolis's attempt to foreclose in August 1999 was too late.** The court did not err by permanently restraining the nonjudicial foreclosure.

*Bingham*, 111 Wn.App. at 131 (emphasis added).

Significantly, the April 17, 1994 date in *Bingham* is less than six years from the August 1999 foreclosure attempt. This further indicates that the statute of limitations does not start over at day "one" as the Respondents would argue.

Pursuant to the *Bingham* decision, the failure to continue the sale to a date within the 120-day period stops the tolling of the statute and the statute resumes running – however, the six-year period does not start over from the beginning. Instead, the statute continues running through its full six-year period from the date of acceleration (whether from August 15, 2008 or from November 4, 2008, in the instant case). "Tolled" is not tantamount to "reset", as the Respondents would argue. When the lender and Trustee

fail to perfect their claim pursuant to the statute by failing to timely continue the foreclosure sale, the statute of limitations continues.<sup>2</sup>

The Respondents' argument that the February 2, 2015 Notice of Trustee's Sale once again tolled the statute of limitations is erroneous because the statute of limitations expired in August 2014 and/or November 2014 (depending upon whether the Notice of Trustee's Sale or the ten-day window prior to the foreclosure sale is identified as the event of acceleration). By the time the February 2, 2015 Notice of Trustee's Sale was recorded, the Respondents' claims were time barred. A chart outlining the statute of limitations timing is provided in **Appendix I** to the Respondents' Reply Brief.

### III. CONCLUSION

The Respondents initiated a foreclosure sale in August 2008 and then inexplicably waited until February 2015 to restart those efforts. The Respondents now argue that the February 2015 Notice of Trustee's Sale somehow restarted the six-year statute of limitations, presumably giving the Respondents until at least 2021 to conclude a sale that was initiated in 2008.

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<sup>2</sup> See, e.g., *Steinberg v. Steattle-First Nat. Bank*, 66 Wn.App. 402, 409, 832 P.2d 124, 127 (1992), holding that when an original action is dismissed, a statute of limitations is deemed to continue to run as though the action had never been brought and plaintiff may not exclude from the computation of the statute of limitation period the duration of the previous lawsuit.

If accepted by the Court, the Respondents' arguments result only in inequity to the Appellant and to borrowers in the state of Washington and will provide an unfair advantage to lenders. The six-year statute of limitations could conceivably be extended indefinitely by applying the Respondent's "re-start" argument as applied to tolling. If the trial court's decision is upheld by this Court, the result will be that a lender need never accelerate an obligation prior to invoking the power of sale and nonjudicially selling the borrower's property. Furthermore, since acceleration need never be triggered, a lender may thereby completely avoid the consequences of the running of the six-year statute of limitations for the entire period of the installment obligation plus six additional years (i.e., 36 years in the instant case).

The Appellant respectfully requests that the Court reverse the trial court's decision with regard to whether acceleration has occurred and thereby grant the Appellant's Motion for Summary Judgment and deny the Respondent's Motion for Summary Judgment on this legal issue.

The Appellant further requests that the Court award the Appellant its attorney's fees in the underlying case and on appeal.

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Respectfully submitted this 14<sup>th</sup> day of March, 2016.

DICKSON LAW GROUP PS

A handwritten signature in black ink, reading "Thomas L. Dickson". The signature is written in a cursive style with a long horizontal line extending to the left.

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## CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I cause the foregoing Reply Brief of the Appellant to be served upon:

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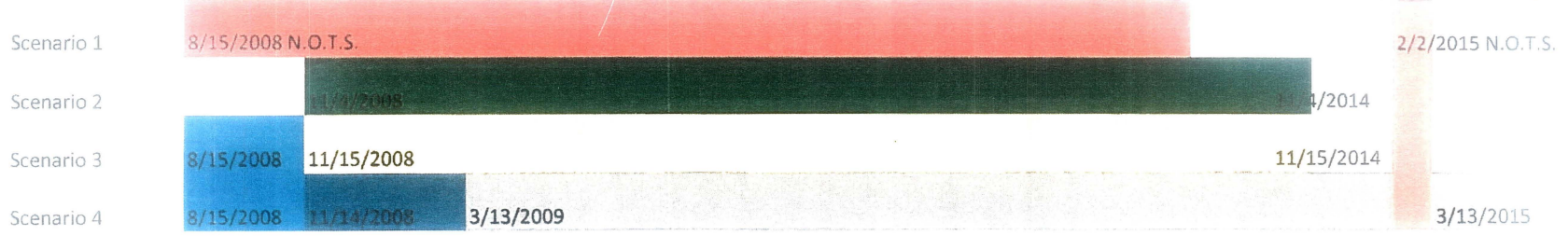
DATED this 14~~th~~ day of March, 2016.

  
 \_\_\_\_\_  
 Elizabeth C. Thompson

## **APPENDIX I**

Timeline on Statute of Limitations (2010-2013 hidden)

August-08  
September-08  
October-08  
November-08  
December-08  
January-09  
February-09  
March-09  
April-09  
May-09  
June-09  
July-09  
August-09  
September-09  
October-09  
November-09  
December-09  
January-14  
February-14  
March-14  
April-14  
May-14  
June-14  
July-14  
August-14  
September-14  
October-14  
November-14  
December-14  
January-15  
February-15  
March-15  
April-15  
May-15  
June-15  
July-15



8/15/2008 First Notice of Trustee's Sale  
 11/3/2008 Last date to pay arrears  
 11/4/2008 Start of 10-day period where entire amount is due  
 11/14/2008 Date of first scheduled foreclosure sale.  
 11/15/2008 Day after first scheduled foreclosure sale.  
 3/13/2009 120 days from first scheduled foreclosure sale.  
 11/21/2011 Discontinuance of Trustee's Sale  
 8/15/2014 Six years from first Notice of Trustee's Sale  
 11/4/2014 Six years from start of 10-day period.  
 2/2/2015 Second Notice of Trustee's Sale

- Statute of Limitations Running from 1st Notice of Trustee's Sale.
- Statute of Limitations Running from 10-day period when all amounts due.
- Tolling of SOL from 1st Notice of Trustee's Sale to 1st Sale date.
- Tolling of SOL from 1st Sale date to 120-days after.
- Statute of Limitations Running from day after 1st sale date.
- Statute of Limitations Running from 120-days after sale.
- Recording of 2nd Notice of Trustee's Sale